Joseph F. Sirangelo, Vincent Sirangelo, Phillip Emma, Angelo Servideo and Joseph Cillo d/b/a Anna Erika Home for Adults *and* District 6, International Union of Industrial, Service, Transport and Health Employees. Case 29–CA–14058

June 7, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND RAUDABAUGH

On September 26, 1990, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The judge found, and we agree, that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to meet and negotiate with District 6, the incumbent Union, concerning the terms of a new contract after Local 1115, Nursing Home and Hospital Employees' Union, filed a representation petition.[2] However, the judge recommended dismissal of the complaint allegation that the Respondent also violated Section 8(a)(5) and (1) by refusing to meet to discuss grievances unless District 6 agreed to continue in effect all the terms of the existing contract between the parties.[3] The General Counsel excepts, and we find merit to the exceptions.

The only witness to testify at the hearing was William Perry, the president of District 6. Perry testified that in early 1989, he asked Vincent Sirangelo, the Respondent's principal owner/operator, to meet to discuss terms of a new contract and to settle various grievances. Perry testified that the grievances, some of which had been reported to District 6 by its shop steward, Ms. Pagenucci, concerned the Respondent's refusal to pay employees their vacation pay before they went on vacation, its failure to pay overtime, and the fact that some employees had complained that they had not received cards showing that they had medical benefit coverage. Sirangelo, however, refused to meet with District 6 unless Perry agreed to sign a contract with no changes at all from the terms of the parties' existing agreement.

The judge, as we have noted, recommended dismissal of the complaint allegation concerning the Respondent's refusal to discuss grievances. He found that the evidence failed to describe adequately the grievances in question, and that there was little or no competent evidence that the grievances even existed. He apparently relied in part on the failure of District 6 to present evidence that grievances over the subjects mentioned above had ever been filed, and also on the fact that the shop steward had not been called to testify.

Contrary to the judge, we find that Perry, in his testimony summarized above, adequately—indeed, explicitly—described the nature of the grievances District 6 wished to discuss with Sirangelo. And although Perry, who apparently was not in a position to have firsthand knowledge of the problems at the Respondent's facility,[4] may not have been technically ''competent'' to testify regarding the alleged grievances, the Respondent's refusal to discuss grievances was not based on any asserted doubt that grievances actually existed.[5] Nor was it grounded in District 6's failure to file formal grievances.[6] Rather, it was based on Perry's refusal to capitulate to the Respondent's bargaining demands.

It is well settled that grievance procedures are mandatory bargaining subjects that may not be unilaterally modified or abrogated by an employer.[7] And an employer's statutory obligation to bargain with an incumbent union is not removed merely because another

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We correct three inconsequential errors in the judge's decision: (1) The last year referred to in part II, par. 1, should be 1989, not 1986. (2) As the judge stated in fn. 2, the ''open period'' for filing timely representation petitions by rival unions normally is from 90 to 60 days prior to the expiration date of an existing contract. However, the authority for that statement is not *Deluxe Metal Furniture Co.*, 121 NLRB 995 (1958), but *Leonard Wholesale Meats*, 136 NLRB 1000, 1001 (1962), which superseded *Deluxe Metal Furniture* in this regard. Moreover, in the case of health care institutions such as the Respondent, see *Anna Erika Home for Adults*, 301 NLRB No. 100, slip op. at 3 (Feb. 14, 1991) (not reported in Board volumes), the ''open period'' is from 120 to 90 days prior to the expiration of the contract. *Trinity Lutheran Hospital*, 218 NLRB 199 (1975). (3) The judge described the Respondent's facility as located in Brooklyn, New York. The facility is located in Staten Island.

[2] *RCA Del Caribe, Inc.*, 262 NLRB 963 (1982).

[3] The judge also recommended dismissal of the complaint allegation that the Respondent failed and refused to make monthly payments into District 6's welfare fund as required by the contract. No exceptions were filed concerning that recommendation.

[4] Perry testified that he learned of the problems from one Guy Perry, who ''used to cover the place and he reported it to me.''

[5] Had Sirangelo harbored any such doubt, he presumably would have voiced it. In addition, he could have demanded to talk to Pagenucci, the shop steward, who would have been in a better position to know the details of outstanding grievances. On this record, he did neither.

[6] In any event, Perry testified that he and Sirangelo had a practice of dealing with grievances over the telephone and in meetings in a diner, rather than in writing.

[7] *Bethlehem Steel Co.*, 136 NLRB 1500, 1502–1503 (1962), enfd. in relevant part sub nom. *Shipbuilders v. NLRB*, 320 F.2d 615 (3d Cir. 1963).

labor organization has filed a representation petition.[8] Thus, an employer may not unilaterally abrogate the contractual grievance procedure merely because it is faced with a petition from a rival union.[9] Accordingly, by refusing to bargain over grievances unless District 6 agreed to its contract demands, the Respondent violated Section 8(a)(5) and (1) of the Act.[10]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Joseph F. Sirangelo, Vincent Sirangelo, Phillip Emma, Angelo Servideo and Joseph Cillo d/b/a Anna Erika Home for Adults, Staten Island, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(b) and reletter the subsequent paragraphs.

''(b) Conditioning bargaining over grievances with any such labor organization on the acceptance by that labor organization of the Respondent's contract demands.''

2. Substitute the following for paragraph 1(c) and reletter the last paragraph as 2(b).

''2. Take the following affirmative action necessary to effectuate the policies of the Act.

''(a) Post at its facility in Staten Island, New York, copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.''

3. Substitute the attached notice for that of the administrative law judge.

[8] *RCA Del Caribe, Inc*., supra, 262 NLRB at 965.

[9] *Airport Aviation Services*, 292 NLRB 823 (1989). The Board adopted this finding of the administrative law judge in the absence of exceptions. Id. at fn. 4. We place our imprimatur on it here.

Nor did the expiration of the contract on June 30, 1989, relieve the Respondent of its obligation to honor the grievance procedure. *White Oak Coal Co*., 295 NLRB 567 (1989).

[10] Since the events in this case transpired, Local 1115 has been certified as the representative of employees in the bargaining unit. See *Anna Erika Home for Adults*, supra. Because of the change in representatives, we shall order the Respondent only to cease and desist from further violations. Our decision not to require an affirmative remedy concerning discussion of grievances, however, does not prevent employees from pursuing unresolved earlier grievances through the current bargaining representative. See *Arizona Portland Cement Co*., 302 NLRB 36, 37 (1991).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain with any labor organization with whom we have a lawful obligation to bargain under the provisions of the National Labor Relations Act.

WE WILL NOT condition bargaining over grievances with any such labor organization on the acceptance by that labor organization of our contract demands.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

JOSEPH F. SIRANGELO, VINCENT SIRANGELO, PHILLIP EMMA, ANGELO SERVIDEO AND JOSEPH CILLO D/B/A ANNA ERIKA HOME FOR ADULTS

Elizebeth Orfan, Esq., for the General Counsel.
Steven B. Horowitz, Esq. (Horowitz & Pollack P.C.), for the Respondent.
Jonathan Walters, Esq. (Walters, Willig, & William), for the Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in New York, New York, on June 8, 1990. The charge was filed on April 26, 1989, and the complaint was issued on June 9, 1989. In substance the complaint alleged:

1. That since 1986 the Union (District 6), has been the recognized bargaining agent for certain of the Respondent's employees and that the last contract between these parties ran from 1986 to 1989.

2. That another labor organization, Local 1115 Nursing Home and Hospital Employees' Union, filed on January 9, 1988, and March 3, 1989, representation petitions requesting an election in the unit represented by District 6.

3. That since February 9, 1989, the Respondent has failed and refused to bargain with District 6 concerning that Union's request for a successor contract.

4. That since February 1989, the Respondent has failed and refused to make monthly payments to the District 6 welfare fund as required by the aforesaid collective-bargaining agreement.[1]

5. That since March 15, 1989, the Respondent has refused to bargain with District 6 regarding individual grievances having arisen under the terms of the previous collective-bargaining agreement and has conditioned meeting with District 6 on that Union's willingness to continue in effect all the terms and conditions of the expired contract.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that District 6 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

District 6 for about 10 years was recognized by the Respondent as the bargaining agent of certain of its employees. A collective-bargaining agreement covering such employees was executed with a term from May 5, 1986, to November 30, 1989. However, on May 7, 1986, a memorandum of understanding was executed which changed the term of the agreement from July 1, 1986, to June 30, 1989.

Under the terms of the agreement, the Employer was obligated to contribute $36 per month to the Union's welfare fund on behalf of employees employed for more than 5 years. For employees employed more than 2 years the required contribution was $28 per month. The agreement also provided for a grievance procedure which culminated in binding arbitration.

Because of the change in contract expiration dates noted above, Local 1115 filed two separate petitions with the Board's Regional Office so as to make certain that a petition was timely filed within the 90- to 60-day period.[2] These petitions were filed respectively on January 9, 1989, and March 3, 1989. Subsequently, on September 7, 1989, Local 1115 won an election by an overwhelming majority.[3]

On February 9, 1989, District 6's president, William Perry, wrote to the Respondent requesting negotiations. In his letter, was a group of contract demands.

Perry contends that between February 9 and March 15 he had a number of telephone conversations with Vincent Sirangelo wherein the latter claimed that the Union's demands were too high. Perry claims that Sirangelo asserted that he had spoken to Local 1115, that they had offered him a better deal and, that unless District 6 lowered its demands, he was not wasting his time in meetings. According to Perry, Sirangelo stated that the Company would be willing to sign a new contract if it maintained the status quo regarding wages and benefits.

On March 15, 1989, District 6 sent another letter to the Company requesting negotiations.

According to Perry, on March 20 he phoned Sirangelo who said that he did not want to meet with District 6 unless it was agreed that any new contract would not have any wage increases or other changes. Perry also states that during this conversation he told Sirangelo that he wanted to meet regarding some problems raised by the shop steward but that Sirangelo refused. (According to Perry, the shop steward had raised with him a problem regarding vacations and had also reported that some employees claimed that they had not received medical cards. The evidence, however, does not show that District 6 ever filed any grievances relating to these alleged problems and Pagenucci, the shop steward, was not called to testify as to the existence of these problems.) On March 20, 1989, Perry wrote to Sirangelo protesting the latter's refusal to meet.

According to Perry, he met with Sirangelo at a diner during the week of April 18, 1989. He states that Sirangelo refused to discuss anything about a contract or about grievances unless District 6 signed a contract with no increases.

Perry testified that with respect to welfare fund payments, the past practice was that the Employer accompanied its monthly checks with a list of the employees on whose behalf the payments were made. He testified that he thought that sometime in 1988 or 1989 the Respondent ceased furnishing the lists. While he initially asserted that in the beginning of 1989 the Company ceased making contributions to the welfare fund, Perry acknowledged that checks were in fact received and cashed. It appears that Perry's contention is that without the lists, he was in no position to know whether the payments accurately reflected the amounts properly due under the terms of the collective-bargaining agreement. District 6, however, never invoked the grievance-arbitration provisions of its contract either to compel the Company to make such payments or to ascertain which employees were entitled to the medical benefit payments. Further, there is no contention in this case that the Respondent illegally refused to supply relevant information to the Union.

While the complaint alleges that the Respondent failed to make payments to District 6's welfare fund, the parties stipulated that from February 9, 1989, through April 9, 1990, the Respondent sent monthly checks to the Union's fund in amounts ranging from $461.35 to $328.28. There was no evidence that commencing in February 1990 the amounts of the payments were reduced from what they had previously been. Neither the Union nor the General Counsel subpoenaed any company records (such as payroll records), to show that the amounts of the payments were not consistent with the num-

[1] The General Counsel contends that the Respondent is obligated to make payments to the welfare fund notwithstanding the expiration of its contract with District 6. She concedes, however, that such payments should not be required after October 27, 1989, which is the date that Local 1115 was certified in place of District 6 as the bargaining representative of the employees in question.

[2] Under Board rules, a rival union which seeks to represent a unit of employees, is generally required to file its petition within 90 to 60 days prior to the expiration date of the existing collective-bargaining agreement, or after expiration if no new contract has been entered into. *Deluxe Metal Furniture Co.*, 121 NLRB 995 (1958).

[3] Local 1115 won that election notwithstanding the Employer's unfair labor practices designed to induce employees to vote against that labor organization. Thus, in a prior decision reported at 298 NLRB 924 (1990), the Respondent was held to have violated Sec. 8(a)(1) and (3) of the Act by various actions including the discharge of supporters for Local 1115.

ber of employees who were eligible for this benefit. No evidence was presented by the General Counsel or the Union to establish that any employee had medical benefits denied by virtue of the alleged failure to contribute to the fund. Finally, there was no other evidence adduced to prove the alleged failure to make welfare fund contributions.

III. DISCUSSION

In *RCA Del Caribe, Inc*., 262 NLRB 963, 965 (l982), the Board stated:

> [W]e have determined that the mere filing of a representation petition by an outside, challenging union will no longer require or permit an employer to withdraw from bargaining or executing a contract with an incumbent union. Under this rule, an employer will not violate Section 8(a)(2) by postpetition negotiations or execution of a contract with an incumbent, but an employer will violate Section 8(a)(5) by withdrawing from bargaining based solely on the fact that a petition has been filed by an outside union.
>
> This new approach affords maximum protection to the complementary statutory policies of furthering stability in industrial relations and of insuring employee free choice. It should be clear that our new rule does not have the effect of insulating incumbent unions from a legitimate outside challenge. As before, a timely filed petition will put an incumbent to the test of demonstrating that it still is the majority choice. . . . Unlike before, however, even though a valid petition has been filed, an incumbent will retain its earned right to demonstrate ifs effectiveness as a representative at the bargaining table. . . .
>
> [I]f the incumbent prevails in the election held, any contract executed with the incumbent will be valid and binding. If the challenging union prevails, however, any contract executed with the incumbent will be null and void. [Citations omitted.]

In the present case, the evidence shows that after Local 1115 filed its petition for an election, the Respondent, in effect, refused to meet and negotiate with District 6, the incumbent Union, for terms of a new contract. As such, it is concluded that in this respect, the Respondent violated Section 8(a)(1) and (5) of the Act.

While it is asserted that the Respondent refused to meet and discuss certain grievances, the evidence failed to adequately ascertain what grievances the Union wished to have presented. The testimony as to the nature of these alleged grievances was vague and indeterminate and there was little or no competent evidence that such ''grievances'' even existed. In this regard, I recommend that the complaint be dismissed.

I shall also recommend dismissal of the allegation that the Respondent failed to make contractually required payments to District 6's welfare fund. In this regard, the evidence did not establish that the Respondent had either failed or been delinquent in making such payments. The record disclosed that since February 1989 and through April 1990, the Respondent made monthly payments to the Union's welfare fund. The General Counsel or the Charging Party could have subpoenaed payroll and other records to show that the number of employees eligible for welfare fund benefits would have required payments in amounts above the amounts actually paid. They also might have shown that the payments after February 9 were significantly different than monthly payments prior to that date. In short, it is my opinion that the allegation requires some proof beyond a mere assertion.[4]

CONCLUSION OF LAW

By failing and refusing to meet with District 6, International Union of Industrial, Service, Transport and Health Employees during the pendency of a representation petition, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. However, inasmuch as District 6 has been supplanted pursuant to a Board-conducted election by Local 1115, no bargaining order on behalf of District 6 would be appropriate.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondents, Joseph F. Sirangelo, Vincent Sirangelo, Phillip Emma, Angelo Servideo and Joseph Cillo d/b/a Anna Erika Home for Adults, its Brooklyn, New York, officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with any labor organization with whom it has a lawful obligation to bargain under the provisions of the National Labor Relations Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

(c) Post at its facility in Brooklyn, New York, copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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[4] In my opinion, the Charging Party's reliance on *Detroit Cabinet & Door Co*., 247 NLRB 1415 (1980), is misplaced. Although a Board majority found that the Respondent violated Sec. 8(a)(5) of the Act by delinquent fund payments and by its failure to permit an audit, those facts were not in dispute as the Respondent had failed to file an answer to the complaint.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.